No. 17-1091

In the Supreme Court of the United States

TYSON TIMBS,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Indiana

BRIEF OF *AMICI CURIAE* PROFESSORS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eighth Amendment's Excessive Fines Clause is incorporated against the States under the Fourteenth Amendment.

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INTEREST OF THE *AMICI CURIAE*[1]

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief. The parties have given blanket consent to the filing of *amicus* briefs.

(2000); *Escalating the War on Drugs: Causes and Consequences*, 20 Stan. L. & Pol'y Rev. 293 (2009); *The Allocation of Police in Handbook on the Economics of Crime* (B. Benson & P. Zimmerman, eds. 2010); and *Predatory Public Finance and the Evolution of the War on Drugs* in *For Your Own Good: Taxes, Paternalism, and Fiscal Discrimination in the Twenty-First Century* (A. Hoffer & T. Nesbit, eds. 2018).

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SUMMARY OF ARGUMENT

State and local governments have been levying greater and greater fines and relying heavily on forfeitures in recent years, often at the expense of people who can least afford to pay. Fines and forfeitures are punishments, but they can also make money for cities and states, which gives governments an incentive to increase these punishments to excessive levels.

The Framers recognized this danger, and included the Excessive Fines Clause in the Bill of Rights to prevent such abuses. But, partly because the Clause has not yet been incorporated against the states, many states and cities are indeed levying excessive fines and forfeitures.

Some fine the poor more often and in greater amounts, and throw those who cannot pay into what has been described as modern-day debtor's prisons. Forfeiture practices also hit financially vulnerable communities particularly hard. And because this is a financially profitable enterprise, it is often also politically profitable: many who bear the brunt of fines and forfeitures lack the political power to resist them. The government knows this, and also knows that raising broadly applicable taxes instead of raising revenue from fines and forfeitures would likely spur a political backlash.

But the right to be free from excessive fines and forfeitures[2] is a basic right of all Americans, recognized by the Framers as no less important than its Eighth Amendment siblings, the right to be free from cruel and unusual punishments and from excessive bail (as well as other fundamental rights, such as those secured by the First and Second Amendments). The Excessive Fines Clause and the protection against excessive fines should be recognized as a right secured by the federal Constitution against state transgressions, and as a bulwark against the states' financial and political incentives to increase fines and forfeitures more and more.

ARGUMENT

I. This case merits the Court's attention because unmanageable fines sharply affect the lives of many Americans

A. Excessive fines particularly harm poor Americans

Fines are the most common form of punishment used by local, state, and federal governments.[3] And their effect is not just broad but deep: they can drive

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[2] The Court has previously held that forfeitures constitute fines for the purposes of the Excessive Fines Clause. *See Austin* v. *United States*, 509 U.S. 602 (1993) (civil forfeitures); *Alexander* v. *United States*, 509 U.S. 544 (1993) (criminal forfeitures).

[3] Karin D. Martin, Bryan L. Sykes, Sarah Shannon, Frank Edwards & Alexes Harris, *Monetary Sanctions: Legal Financial Obligations in US Systems of Justice*, 1 Ann. Rev. Criminology 471, 472 (2018); *see also* Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. Ill. L. Rev. 1175, 1186-96.

poor Americans into a vicious cycle of growing economic disaster.

A fine that would be bearable (even if constitutionally excessive) to many of us may well be beyond a poor person's ability to pay. People's failure to pay promptly may lead to still greater fees and surcharges, and can harm their credit, which can make it harder for them to find stable housing and employment. The accumulated fees may also lead to jail time for failure to pay, or other penalties such as the loss of a driver's license—which may in turn cost people their jobs, particularly in rural or other areas with limited or no access to public transportation. All this makes it even harder for them to pay their ever-growing debt, a debt that began with the original fine but that continues to climb indefinitely.

Indeed, much of the burden stemming from fines is generally borne by the poorest citizens, who often accrue "poverty penalties" that may sharply exceed the monetary value of the original fine: late fees, interest fees, or administrative fees such as fees for entering into a payment plan.[4] Such poverty penalties are traps—easily stepped over by the majority of citizens who are able to pay, but serious obstacles with real consequences for those who are not. In some cases, debtors have been forced to choose between "basic

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[4] Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. Rev. 2, 2-8 (2018); Criminal Justice Policy Program at Harvard Law Sch., *Confronting Criminal Justice Debt: A Guide for Policy Reform* 15 (2016), http://cjpp.law.harvard.edu/assets/Confronting-Crim-Justice-Debt-Guide-to-Policy-Reform-FINAL.pdf.

necessities such as food, hygiene, and housing on the one hand, and making payments against their economic sanctions on the other."[5] In others, debtors are simply unable to pay the fines at all. And these problems also disproportionately affect black and Hispanic communities, as well as the poor of all races.[6]

The various fines, surcharges, fees, and costs that the government may impose in a given case can effectively stack up on each other, exacerbating what was already unmanageable debt. For Harriet Cleveland of Alabama, for example, the stacking of sanctions meant that, despite sustained efforts to pay, she could never overcome the debt imposed by a court for driving without insurance or a license.[7]

The court sentenced her to pay a fine and court costs, and placed her on private probation with a $40 per month supervision fee.[8] Unable to find regular employment, Ms. Cleveland did what she could to pay—including turning her entire income-tax rebate over to the probation company, taking out a title loan on her car, "rent[ing] an empty room in her home to

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[5] Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Cal. L. Rev. 277, 293 (2014).

[6] *See, e.g.*, Alexes Harris, *A Pound of Flesh: Monetary Sanctions as Punishment for the Poor* 152 (2016).

[7] Sarah Stillman, *Get Out of Jail, Inc.*, New Yorker 49 (June 23, 2014).

[8] *Id.* The government benefits financially when partnering with private probation and collections companies, both through collecting more money and because privatization relieves the government of the need to expend tax dollars for privatized services. *See* Colgan, *supra* note 4, at 28-25.

an elderly stranger with dementia," "sift[ing] through neighbors' trash for soda cans to cash in at the scrap yard," and even stealing $50 from her son's backpack and scrap metal from abandoned homes—but her debt still jumped from a few hundred dollars to $4,713 in four years.[9] When the probation company turned her file back over to the state, the state tacked on even more administrative fees and surcharges.[10] Like so many others, Ms. Cleveland had no meaningful ability to extricate herself from this punishment.

Indeed, some states systematically target poor people with fines. ArchCity Defenders, a nonprofit legal aid organization based in St. Louis, Missouri, found that local governments in Ferguson and other municipalities were operating

> on the backs of their poorest and most politically vulnerable citizens. The municipalities appeared to be targeting low-income and black communities with these practices. For example, fines were collected at rates more than fifteen times higher in one low-income, majority-black community than in a more affluent neighboring municipality. Ferguson was among the three worst offenders.[11]

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[9] Stillman, *supra* note 7, at 49-50, 53-54.

[10] *See id.*

[11] Beth A. Colgan, *Lessons from Ferguson on Individual Defense Representation as a Tool of Systemic Reform*, 58 Wm. & Mary L. Rev. 1171, 1174-75 (2017) (footnotes omitted); *see also* U.S. Dep't of Justice Civ. Rts. Div., *Investigation of the Ferguson Police Department* 52 (Mar. 4, 2015) (describing the fines imposed for minor offenses in Ferguson), https://www.justice.gov/

Nor are states necessarily deterred by the difficulty of collecting fines (however multiplied through late fees) from the poor: the threat of jail time can often be used to collect the money "from the families and friends of those arrested who wished to save their loved ones from languishing in jail."[12] (You can't get blood from a stone, but maybe from the stone's friends.) And because poor citizens are less likely to vote, and to have access to other forms of political power, governments may find it easier to target fines against them. Meanwhile, as Ms. Cleveland discovered, politically influential private entities play a role in the money-making enterprise, stacking the deck further against the likelihood of meaningful resistance being brought to bear outside the courts.

Were the federal government to engage in such schemes to raise revenue through excessive fines, the Excessive Fines Clause would bar fines that are "gross[ly] disproportionat[e]" to the severity of the offense. *United States* v. *Bajakajian*, 524 U.S. 321 (1998). But when fines are imposed by those states whose courts have refused to incorporate the Clause—or by the many cities or counties within those states—no federal constitutional protection is available.

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sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

[12] *Id.* at 1204. Such jailing of people who are unable (rather than unwilling) to pay may be separately unconstitutional under *Bearden* v. *Georgia*, 461 U.S. 660 (1983); but if courts are barred from imposing excessive fines in the first place, that would yield much less occasion for such unconstitutional jailing. Colgan, *supra* note 11, at 1223-24 & n.302.

B. Excessive fines often lead to losses of licenses and other benefits, and to destroyed credit

Excessive, unaffordable fines often lead to the loss of government benefits such as housing assistance, supplemental security payments, and food stamps.[13] Failing to pay fines can also lead to the government revoking one's driver's license.[14] That in turn makes it harder for a person to get to work, to keep a job, and thus to earn money to pay the fines—which will then end up snowballing because of the failure to promptly pay. Nonpayment of criminal debt may also result in the denial of occupational licenses, likewise making it harder to get or keep a job.[15] And ongoing

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[13] Some states have made it a violation of parole or probation for a person to not pay his fines. When one violates parole, one also loses government benefits. *See, e.g.*, 42 U.S.C. § 608(a)(9)(A); 7 U.S.C. § 2015(k)(1); 42 U.S.C. § 1437d(l)(9); 42 U.S.C. § 1382(e)(4)(A)(ii).

[14] Lawyers Comm. for Civil Rights of the San Francisco Bay Area, *Not Just a Ferguson Problem: How Traffic Courts Drive Inequality in California*, 9 (2016), http://www.lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.20.15.pdf; Joseph Shapiro, *Supreme Court Ruling Not Enough to Prevent Debtors Prisons*, NPR (May 21, 2014), https://www.npr.org/2014/05/21/313118629/supreme-court-ruling-not-enough-to-prevent-debtors-prisons.

[15] Colgan, *supra* note 4, at 80-81; *see also, e.g.*, Mo. Rev. Stat. § 302.755(17) (disqualifying use of a commercial driver's license for "failure to . . . pay"); Utah Code Ann. § 41-3-201(9)(a) (denying issuance of salvage license until full payment of restitution); Va. Code Ann. § 54.1-2813 (limiting eligibility for funeral services license until applicant "has successfully fulfilled all condi-

criminal debt can also destroy a debtor's credit, making it difficult to secure stable employment or housing. As the Washington Supreme Court explained,

> The court's long-term involvement in [debtor's] lives [during collections] inhibits reentry: legal or background checks will show an active record in superior court for individuals who have not fully paid their [criminal debt]. . . . This active record can have serious negative consequences on employment, on housing, and on finances. [Criminal] debt also impacts credit ratings, making it more difficult to find secure housing.[16]

Excessive fines thus put financially vulnerable people into increasingly precarious circumstances. For many, their criminal debts can be effectively perpetual even for minor offenses.

C. Unmanageable fines often especially burden juvenile offenders

Unmanageable fines particularly harm poor youth and their families. They are assessed poverty penalties just as adults are,[17] but usually lack the re-

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tions of sentencing, been pardoned, or has had his civil rights restored").

[16] *State* v. *Blazina*, 344 P.3d 680, 684 (Wash. 2015) (citation omitted).

[17] For instance, juveniles may be responsible for paying court expenses, public defender fees, evaluation and testing costs, treatment costs, health care costs, GPS monitoring costs, and cost of care. *See* Jessica Feierman, Naomi Goldstein, Emily Haney-Caron & Jaymes Fairfax Columbo, *Debtors' Prison for Kids? The High Cost of Fines and Fees in the Juvenile Justice*

sources to pay them; the practical cost is thus often borne by their parents, who are often already burdened with all the expenses of parenthood. Such sanctions thus "cause families difficulty 'surviving on a day to day basis,'"[18] sometimes forcing them to choose between buying groceries and paying their fines.[19] And excessive fines on juveniles may also have spillover effects on the juveniles' siblings. Forced to pay off one child's court fines, families may not have enough money for their other children's school clothes or college tuition.[20]

Excessive fines also appear to increase adolescent recidivism. A recent study found that imposing restitution, imposing higher economic sanctions, and continuing debt even when a case is closed "all significantly increased the odds of a youth recidivating. . . . even after controlling for relevant youth demographics and case characteristics variables."[21] Often, juveniles who fail to pay fines may be jailed, have their driver's license revoked, or be prevented from expunging their records.[22] This traps them in

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System 5, 13-15 (Juvenile Law Center 2016), https://debtorsprison.jlc.org/documents/JLC-Debtors-Prison.pdf.

[18] *Id.* at 6.

[19] *Id.* at 7.

[20] *Id.*

[21] Alex R. Piquero & Wesley G. Jennings, *Justice System–Imposed Financial Penalties Increase the Likelihood of Recidivism in a Sample of Adolescent Offenders*, 15 Youth Viol. & Juv. Just. 325, 334 (2017).

[22] Feierman, *supra* note 16, at 23.

the juvenile justice system, with little hope of getting out.[23]

The lingering effects of failing to pay juvenile fines, which include criminal contempt, probation violations, or additional fees, may even follow the juveniles into adulthood in the form of property liens, ineligibility for expungement, and destroyed credit.[24] And black and Hispanic youth and their families also appear to be disproportionately hurt by the juvenile system's fines. Even when the rate of juvenile crimes is similar among minority youth and white youth, minority youth are more likely than white youth to still owe money at the closure of their case.[25]

II. Like fines, forfeitures are ubiquitous and can be financially devastating

Forfeiture practices are widespread throughout the country—and financially lucrative. Many such seizures come out of "civil asset forfeiture" programs, in which the government secures a forfeiture without first obtaining a conviction, and at times without ever having filed criminal charges.[26] The drive to use forfeiture to raise revenue may incentivize policing of offenses where seizures of cash or property are most

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[23] *Id.*

[24] *Id.* at 7.

[25] Piquero, *supra* note 20.

[26] *See, e.g.*, Bruce L. Benson, *Escalating the War on Drugs: Causes and Unintended Consequences*, 20 Stan. L. & Pol'y Rev. 293, 297 (2009); Institute for Justice, *Policing for Profit: The Abuse of Civil Asset Forfeiture* (2d ed. 2015).

likely, to the detriment of policing violent crimes.[27] While this may include seizures of high value items such as family homes,[28] and automobiles, in some jurisdictions police are even seizing small amounts of cash during police encounters.[29]

Like fines, forfeitures can be financially devastating. Forfeiture practices often "target the poor and other groups least able to defend their interests in forfeiture proceedings."[30] A forfeiture may deprive people of cash they need for basic necessities, a vehicle used for transport to work or school, or even the roof over their and their family's heads.

III. Incorporation is necessary because states have strong financial incentives to raise revenue by levying excessive fines and forfeitures

Sovereigns are always thirsty for money, and fines and forfeitures are often an easy way to get this money. Fines and forfeitures are thus especially likely to be abused—which is why the forerunner of the Ex-

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[27] *See* Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. Chi. L. Rev. 35, 314 (1998).

[28] *See, e.g.*, Pamela Brown, *Parent's House Seized After Son's Drug Bust*, CNN (Sept. 8, 2014).

[29] Robert O'Harrow Jr. & Steven Rich, *D.C. Police Plan for Future Seizure Proceeds Years in Advance in City Budget Documents*, Wash. Post (Nov. 15, 2014); ACLU, *Guilty Property: How Law Enforcement Takes $1 Million in Cash from Innocent Philadelphians Every Year—and Gets Away With It* (June 2015).

[30] *Leonard* v. *Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., respecting the denial of certiorari).

cessive Fines Clause in Anglo-American law dates back to Magna Carta.[31]

Today, the system of targeting the poor with fines and then imposing "poverty penalties" generates huge sums for states and localities, as do forfeitures. They operate as regressive taxes—where those with the least ability to pay end up paying the most.

And these practices are especially politically appealing because they reduce taxes for the wider population, while burdening those who are least likely to push back. The poor, who are most effected by excessive fines and forfeitures, are also among the least likely to vote.[32] They are less likely to acquire politi-

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[31] The Clause was taken almost verbatim from Virginia's excessive fines clause, which was borrowed from the English Bill of Rights, which in turn dates back to Magna Carta. *Browning-Ferris Indus. of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 266-68 (1989). Before Magna Carta, the King often imposed excessive fines on his subjects or political enemies to raise revenue. But under Magna Carta, the King was specifically limited in using fines as a source of royal revenue or as a weapon against his enemies. *Id.* at 268-72. Furthermore, provisions in Magna Carta explicitly stated that defendants' lives and their ability to maintain a livelihood should not be ruined by fines, and prohibited fines that bankrupted defendants. Colgan, *supra* note 5, at 321.

[32] Daniel Weeks, *Why are the Poor and Minorities Less Likely to Vote?*, The Atlantic (Jan. 10, 2014), https://www.theatlantic.com/politics/archive/2014/01/why-are-the-poor-and-minorities-less-likely-to-vote/282896/ (citing U.S. census data showing that "47 percent of eligible adults with family incomes of less than $20,000 a year voted in 2012 and just one in four voted in the midterm election of 2010. By contrast, those with annual earnings of $100,000 or more turned out at rates of around 80 percent and 60 percent, respectively.")

cal power in other ways, such as through contributing to political campaigns. They are less likely to have friends in high places. And people with a criminal record may often be unable to regain their voting rights if they fail to pay their criminal debts. Laws in thirty-four states allow for continued disenfranchisement due to outstanding criminal debt regardless of whether the would-be voter has any meaningful ability to pay.[33]

Given this political reality, it is not surprising that fines and forfeitures are increasing: For example, Arizona originally imposed an extra 57% felony surcharge based on the combined total of other economic sanctions.[34] In 2012, that surcharge rose to 83%.[35] Similarly, in the past ten years the Department of Justice's asset forfeiture program has involved seizures of money and property totaling over $28 billion[36]—and this excludes forfeitures obtained through local or state proceedings.[37]

And just as state legislatures have an incentive to create laws that lead to excessive fines and forfeitures, state courts have an incentive not to police

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[33] Beth A. Colgan, *Wealth-Based Penal Disenfranchisement* (forthcoming).

[34] Alexes Harris, *A Pound of Flesh: Monetary Sanctions as Punishment for the Poor* 23-24 (2016).

[35] *Id.*

[36] Office of the Inspector General, U.S. Dep't of Justice, Review of the Department's Oversight and Cash Forfeiture Activities (Mar. 2017).

[37] *See, e.g.*, Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 Ohio St. L.J. 1409, 1432 (2001).

them. Indeed, fines often fund the courts themselves.[38] Particularly in budget-strapped times, some governments become dependent on revenue from economic sanctions. One report noted that the "Nevada Supreme Court recently went broke because revenue from traffic tickets plummeted, and the city of San Jose, California, lamented the drop in traffic violation revenue."[39] An Oklahoma County District Judge was recently quoted as saying, "Today, we fund probably 90 percent or more of the operation of the courts actually out of the money that the court collects."[40]

Similarly, prosecutors and law enforcement often directly receive forfeiture funds,[41] and this often leads to distorted priorities. For example, earlier this year a bill was filed in Alabama's legislature that would require a conviction prior to forfeiture and that would place revenue from forfeitures in the state's general fund. In response, the presidents of the Alabama District Attorneys Association and Alabama Sheriffs Association publicly stated that, if the bill was passed, prosecutors would file criminal charges in nonviolent and drug-offense cases against people who they oth-

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[38] Matt Ford, *The Problem with Funding Government Through Fines*, The Atlantic (Apr. 2, 2015), https://www.theatlantic.com/politics/archive/2015/04/the-problem-with-funding-government-through-fines/389387/.

[39] Martin, *supra* note 3, at 477 (citations omitted).

[40] Kate Carlton Greer, *Over the Years, Court Fines, Fees Have Replaced General Revenue Funds*, KGOU (Feb. 9, 2015), http://kgou.org/post/over-years-court-fines-fees-have-replaced-general-revenue-funds.

[41] *See* Rachel A. Harmon, *Federal Programs and the Real Cost of Policing*, 90 N.Y.U. L. Rev. 970, 954-55 (2015).

erwise would have believed better served by diversion programs, and law enforcement would stop policing drug and property crimes. Without receiving forfeiture funds, the groups reasoned, "[w]hat incentive would local police and sheriffs have to invest manpower, resources and time in these operations?"[42]

Recognizing the Excessive Fines Clause as limiting state and local action would not cure all these ills. It would only limit excessive fines and forfeitures, which this Court has defined as limited to those that are "gross[ly] disproportionat[e]." *Bajakajian*, 524 U.S. at 336-37. It would leave governments free to impose serious fines that are not excessive. Understandably, such fines and forfeitures may deliberately cause considerable economic pain, so as to deter and punish misconduct.

But incorporating the Clause would at least require state courts to police the outer boundaries of fines as a matter of federal right—and to recognize that state and local governments' growing appetite for raising money through fines must be subject to some constitutional constraint.

CONCLUSION

Anglo-American law has long recognized the wrongness of excessive fines and forfeitures, from 1215 to 1689 to 1791. That right is as important as the others that the Bill of Rights protects.

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[42] Brian McVeigh & Dave Sutton, Op-Ed., *Don't Gut Civil Asset Forfeiture*, AL.com (Feb. 12, 2018), http://www.al.com/opinion/index.ssf/2018/02/dont_gut_civil_asset_forfeitur.html.

Indeed, for the poor, the right is especially important, because excessive fines and forfeitures can impose harsh burdens on poor defendants, burdens that have effects lasting for years. And revenue from fines and forfeitures tempts governments to constantly increase them, and state courts to neglect scrutinizing them. This Court should grant certiorari and decide whether the Excessive Fines Clause should be enforced against state and local governments—as are the other clauses of the Eighth Amendment, and the great majority of the other parts of the Bill of Rights.

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